**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers | ) | D.T.E. 03-60 |

**COMMENTS OF**
**VERIZON MASSACHUSETTS**

On March 3, Verizon Massachusetts ("Verizon MA") moved the Department to stay this proceeding in light of the Court of Appeals' ruling in *United States Telecom Association v. Federal Communications Commission*, No. 00-1012 (decided March 2, 2004) (*USTA II*), which invalidated both the FCC's delegation of authority to determine whether CLECs are impaired without access to unbundled elements and the substantive tests that the FCC promulgated for making such determinations. On March 4, the Department issued a Request for Comments asking for the parties' positions on Verizon MA's motion and "the procedural approach going forward." In particular, the Department asked whether it should stay all or part of the proceeding and, if not, what jurisdictional basis it has for going forward with the case.

For the reasons discussed in Verizon MA's motion and below, the only prudent course is for the Department to stay this proceeding, except for its consideration of individual hot cuts based on the WPTS process, which is an issue arising from the Department's investigation of TELRIC rates in D.T.E. 01-20 – not the *Triennial Review Order*. The Department should consider whether the benefits of suspending the proceeding now for a short period while the federal courts determine the status of the vacated rules outweigh the potential waste and expense

of continuing the case. Notwithstanding the confidence with which certain parties have claimed here and in the press that the D.C. Circuit's opinion will be stayed and overturned, that is sheer speculation. The uncertainty now associated with the *Triennial Review Order* is sufficient reason alone to avoid the unnecessary expense and resource commitments of further litigation at this time. The Department should also assess the extent to which any party would he prejudiced, if at all, by a stay. There is no prejudice to any party by the Department issuing a stay as requested by Verizon MA. When the D.C. Circuit issues its mandate, there will be no valid *TRO* rules to implement concerning the only matters at issue in the case, *i.e.*, whether Verizon MA has satisfied the FCC's triggers for mass market switching, transport, and loops. It makes no sense – and would be unlawful – for the Department to proceed to consider the application of federal unbundling rules that have been invalidated. On the other hand, if the D.C. Circuit's mandate is stayed pending further appellate review, the case can be restarted if the Department chooses. In short, Verizon MA's motion spares the potentially unnecessary expenditure of scarce resources and prejudices no party. It should, accordingly, be granted by the Department.

### A. The Department Should Stay All Portions of This Case, Except for Its Examination of Verizon MA's WPTS Hot Cut Proposal.

As to the Department's first question, the Department should stay all parts of this proceeding, except for its consideration of individual hot cuts based on the WPTS process, which as noted above is a requirement of the Department's order in D.T.E. 01-20. A unanimous, three-judge panel of a United States Court of Appeals struck down the FCC's attempt in the *Triennial Review Order* to delegate authority to state commissions to decide whether and the extent to which incumbent Local Exchange Carriers must make their mass market switching, dedicated transport and high-capacity loop network elements available to CLECs, as well as the FCC's

national findings of impairment as to these elements. In particular, the D.C. Circuit made three findings in *USTA II* that directly impact this proceeding:

a. The court held that the FCC's delegation to the state commissions of the authority to conduct the nine-month impairment proceedings with respect to mass market switching, high-capacity loops, and dedicated transport is unlawful and vacated that delegation, with no remand back to the FCC: "We therefore vacate, as an unlawful subdelegation of the [FCC's] § 251(d)(2) responsibilities, those portions of the [*TRO*] that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements." (Slip op. at 18);

b. The court vacated as unlawful and remanded to the FCC the FCC's national finding of mass market switching "impairment." The Court stated the FCC's "impairment" finding due to hot cuts could not stand because, among other reasons: (1) the FCC "implicitly conceded that hot cut difficulties could not support an undifferentiated nationwide impairment finding" (slip op. at 21); and (2) the FCC must consider more "narrowly-tailored alternatives to a blanket requirement that mass market switches be made available as UNEs," such as rolling access (*id*. at 21-22);

c. The court vacated as unlawful and remanded to the FCC the FCC's dedicated transport rules. Those rules were unlawful because, among other reasons, the FCC: (1) arbitrarily and irrationally defined each point-to-point transport route as a separate "market" (*id*. at 28-29); and (2) refused to "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired," contrary to the 1996 Act (*id.* at 33).

Accordingly, if the Department moved forward with this proceeding and the D.C. Circuit's decision is upheld, the Department would have wasted public and private resources – in preparing for and attending hearings, submitting briefs, analyzing the evidence and so on – in order to decide an issue that the Department has no authority to determine, based on standards that have been struck down. As the Staff of the Maryland Public Service Commission put it in recommending that the PSC stay its *TRO* enforcement proceeding, "The Commission would be

performing a task that the Court has declared is illegal, so it could arrive at the right answers to the wrong questions."[1]

On the other hand, if the Department temporarily stays this case as Verizon MA has requested, but the Supreme Court stays the D.C. Circuit's decision in *USTA II*, the Department can easily pick up this case where it left off. The brief hiatus would not have prejudiced any CLEC. Indeed, the only party that could possibly be prejudiced by a delay is Verizon MA, which is the only party seeking relief from the Department in this proceeding.

To be clear, Verizon MA asks only that this case be stayed until the federal courts determine the status of the vacated rules. Verizon MA has not asked the Department to invalidate any part of the record assembled to date, exclude any information from evidence or dispense with cross-examination of witnesses. Thus, the various actions that DSCI and the CLEC Coalition ask the Department to take in the event of a stay are unnecessary.

AT&T argues that a stay may disadvantage the Department itself, by leaving it with insufficient time to complete its investigation, if necessary, prior to the FCC's July 2 deadline. AT&T's concern is misplaced. It is safe to conclude that should the Supreme Court stay the D.C. Circuit's decision, the FCC will extend its deadline to accommodate state commissions. In order to dispel any concerns in this regard, Verizon MA, as the party most likely to be injured by a failure of the Department to enter a decision within nine months as specified in 47 C.F.R. §§ 51.319(a)(7), 51.319(d)(5) and 51.319(e)(4), agrees that if the Department grants its motion but later lifts the stay, Verizon MA will waive any claim that the Department has failed to act within the nine-month period as long as the Department enters a decision within the nine month period plus the period of time the stay was in effect.

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[1] *See* letter from Assistant Staff Counsel to Public Service Commission of Maryland dated March 4, 2004, at 2, a copy of which is attached hereto.

AT&T also alleges – apparently as grounds for denying the stay – that the D.C. Circuit's decision in USTA II "is quite likely to be stayed for a long period of time" and that AT&T is "highly optimistic" that the Supreme Court will reverse that decision on appeal. AT&T Opposition at 2. MCI makes similar comments. *See* MCI Opposition at 1-2. The CLECs' allegations miss the point.[2] The possibility that the D.C. Circuit's decision may be stayed or reversed offers no grounds for moving ahead with the case at this time. If AT&T's predictions come to pass, the Department can revisit and lift the stay at that time. The hiatus would be brief and, as noted above, no party would be prejudiced. On the other hand, if the Department moves forward and the D.C. Circuit's decision goes into effect, all parties would have expended significant resources to no end. In any event, the Department cannot and should not, based on AT&T's optimistic speculations, ignore the D.C. Circuit's decision and the very real likelihood that further proceedings in this action will be in vain. For the same reason, the Department cannot ignore the D.C. Circuit's order merely because the mandate has not yet issued, as the CLECs argue. *See* AT&T Opposition at 3; DSCI/CLEC Coalition Comments at 1-2.

The only other argument the CLECs have offered to date for moving forward with this case in the face of the D.C. Circuit's decision is the supposition that "Even if, at the end of the day, the FCC is compelled to re-analyze the impairment issue under the Telecommunications Act … it will need to base any further findings on granular, market-specific findings." AT&T Opposition at 4. DSCI and the CLEC Coalition claim that "[T]he record developed in this proceeding will provide a very useful tool to the FCC in examining the actual state of impairment in Massachusetts in the further proceedings resulting from the *USTA II* decision."

[2] With respect to the merits of the CLECs' predictions, they are nothing more than expressions of hope by losing litigants that a higher court may reverse the adverse ruling. Verizon MA disagrees, of course, with the CLECs' assessment.

DSCI/CLEC Coalition Comments at 2. Their claim is that the FCC will inevitably turn to the states to gather this information, so the Department should just forge ahead.

The CLECs' argument is based on the erroneous premise that the Department is conducting a general investigation in this proceeding of the "state of impairment" of CLECs in Massachusetts, as if Verizon MA is proceeding on a "potential deployment" case pursuant to the economic and operational factors listed in the FCC's rules.[3] This is simply not true. As the Department is well aware, Verizon MA has proceeded in this matter solely on the basis that certain of its mass market switching, dedicated transport and loop facilities satisfy the FCC's triggers for those elements. *See* letter from Verizon MA to the Department dated October 3, 2003; see also Procedural Schedule issued by the Department on November 24, 2003 (confirming that Verizon MA "would not be contesting the FCC's national determination of impairment … in this proceeding on the basis of operational or economic impairment factors ….''). Verizon MA has filed testimony and supporting information addressing only the specific factual issues mandated by the FCC's triggers rules. Consequently, even if the Department were to proceed with this case to its conclusion, the resulting findings would not address the general "actual state of impairment in Massachusetts," but would consist solely of specific findings on the specific issues relevant to the FCC's trigger rules. There is no reason to believe those facts will still be relevant or sufficient following an FCC decision on remand.

The CLECs' argument that the Department must move forward and find "the facts" raises the unanswerable questions "Which facts? In what form?" The issues on which the FCC is

[3] MCI even goes so far as to claim that the Department should go forward here "to document current market conditions in Massachusetts" and investigate the alleged "adverse consequences to consumers of granting Verizon's request to eliminate UNE-P …." MCI Opposition at 3-4. Of course, this proceeding is not intended to be a general survey of "market conditions" in the state, nor does the Department's considerations of the FCC's triggers involve, in any way, investigation of "consequences to consumers" should those triggers be met.

likely to ask the states to gather facts for it on remand, if any, will be very different from the "triggers only" facts being developed in this proceeding. For example, the FCC's triggers for dedicated transport ask only whether competitive facilities actually have been deployed by a sufficient number of carriers on a particular route. Thus, the evidence that has been presented to the Department concerns only the particular routes where multiple carriers have deployed facilities. The D.C. Circuit, however, found the FCC's trigger rules unlawfully "ignore facilities deployment along similar routes when assessing impairment." Slip op. at 29. Of course, the parties have offered no evidence of facilities deployment on similar routes in this case, and they will be unable to do so until the FCC defines, on remand, the particular kinds of facts it deems relevant and wishes the state to gather, consistent with the D.C. Circuit's order. Nor does the current proceeding address whether the competitive fiber currently deployed in nearly every major metropolitan area in Massachusetts demonstrates non-impairment throughout those metropolitan areas and/or in markets with similar characteristics.

The situation is no different with respect to mass market switching, where the D.C. Circuit struck down the FCC's finding of impairment and directed the FCC to consider more "narrowly-tailored alternatives" to a blanket unbundling requirement. Until the FCC addresses the issue on remand, the Department cannot know which, if any, alternative the FCC will select, or what facts the FCC may deem relevant.[4] Moreover, given the D.C. Circuit's finding that the

[4] In its original Motion to Stay, Verizon MA asked the Department to proceed with Track B of this case, including consideration of the batch hot cut process. By letter to the Department dated March 10, 2004, however, Verizon MA amended its motion to request that the Department stay the batch hot cuts portion of the case, on the grounds that the D.C. Circuit's decision eliminates any reason or basis for the Department to proceed on the issue. The D.C. Circuit's requirement that the FCC consider "narrower alternatives" to its blanket unbundling requirement with respect to mass market switching offers another reason for staying consideration of the batch hot cut process. The particular alternatives mentioned by the court include "rolling" hot cuts accumulating over 90 days and a system allowing access to UNE-P only until the ILEC is able to perform the hot cut. *See* Slip op. at 22. The FCC's consideration of those alternatives on remand may require modification of Verizon MA's batch hot cuts process or even eliminate the need for the Department to consider such a process.

FCC's prior delegation to the states to consider such alternatives was unlawful, it is not at all clear what role the states will be asked to play following an FCC decision on remand. Again, the Department has built no record on these issues and cannot reasonably do so absent further direction from the FCC.

Verizon MA understands that state commissions in 12 states[5] and the District of Columbia have suspended their Triennial Review proceedings or hearing schedules on a temporary basis either in anticipation or as a result of the D.C. Circuit's decision. The Department should join these state commissions and stay this case until such time as it is clear whether there will be a continuing role for the Department in this matter.

**B. The Jurisdictional Basis for Further Proceedings**

The Department has no jurisdiction to go forward with this case at this time. The D.C. Circuit has unambiguously held that the FCC's attempt to delegate to the states the "authority to determine whether CLECs are impaired without access to network elements …" is unlawful. Slip op. at 18. That the *TRO* temporarily remains in effect does not erase the Court's legal analysis or the basis for its finding. In addition, the very uncertainty over whether the court's order will soon become effective (and thus vacate the *TRO*) provides good and sufficient cause to stay further proceedings until the federal courts take further action on the *TRO*.

What is certain is that, outside the authority granted by the *TRO*, the Department cannot proceed with this case. AT&T argues that the Department has jurisdiction over this matter, even if the D.C. Circuit's decision becomes effective and vacates the *TRO*, based on the Department's

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5 Arkansas, Colorado, Florida, Georgia, Kansas, Minnesota, Mississippi, Nebraska, Ohio, Oregon, Utah, and Washington. Contrary to the claim of MCI that the New York Public Service Commission "has already decided to proceed with the hearings," MCI Opposition at 3, the PSC has not set a litigation schedule for its *TRO* case. Contrary to AT&T's characterization of the remarks of the chair of the New York PSC regarding the PSC's continuing role in gathering data, AT&T Opposition at 5, the chair has not taken any action for the PSC to go ahead with the *TRO* litigation in its present form at this time.

authority to enforce the unbundling requirements of Section 251 of the Act. AT&T Opposition at 7. AT&T's argument misses the mark. This is not an enforcement proceeding. Rather, the Department opened this case solely and exclusively to determine Verizon MA's unbundling obligations under the FCC's *Triennial Review Order*. As the D.C. Circuit found, the Act confers authority to make the unbundling determination on the FCC alone, not state commissions. *See* Slip op. at 12; *see also,* 47 U.S.C. §251(d)(2).

AT&T's argument that the Department has jurisdiction to continue with this case based on its alleged state law authority to require Verizon MA to provide access to UNEs (AT&T Opposition at 7) is similarly lacking in merit. The Department need not decide whether it has such authority here because this case is not, and has never been, a proceeding under state law. As stated in the Department's "Vote and Order to Open Proceeding" entered on August 26, 2003, "[T]he Department votes to open a proceeding to implement the requirements of the FCC's *Triennial Review Order*." Nothing else has been addressed in this case other than implementation of the FCC's rules, and in particular the triggers applicable to mass market switching, transport and loops. Even if the Department wished to proceed under its alleged state law authority to require Verizon MA to make UNEs available, the Department would first have to provide notice to all parties that it was proceeding on that basis and give Verizon MA and the parties a full and fair opportunity to address the legal authority of the Department to proceed, any standards for determining whether, when and to what extent unbundling would be appropriate, and whether state unbundling requirements would be preempted by the Act.

## C. Conclusion

For these reasons, the Department should grant Verizon MA's Motion for Stay.

Respectfully submitted,

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